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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN HOHENEGGER,

Defendant and Appellant.

A153883

(Solano County
Super. Ct. No. VCR216104)

Martin Hohenegger raises numerous challenges to the trial court's victim restitution order. We agree that the trial court erred in failing to offset payments received by the victim from appellant and the Victim Restitution Fund (the Restitution Fund) for funeral expenses that exceeded the victim's actual and reasonable funeral expenses. We reject all of appellant's other challenges.

BACKGROUND

We previously affirmed appellant's conviction for the first-degree murder of Michael Scally, as well as another victim not at issue in this appeal. (*People v. Hohenegger* (Mar. 8, 2018, A147908) [nonpub opn.].) After sentencing, the People filed a motion seeking victim restitution for Michael Scally's widow, Michelle Scally,¹ and repayment to the Restitution Fund for funeral and burial payments made to the families of both victims.

¹ For convenience, we refer to Michael and Michelle by their first names. No disrespect is intended.

At the restitution hearing, Michelle testified that at the time of his death, Michael and his cousin owned a business that sold and serviced certain types of office equipment. Michael handled all of the business's sales and service, while his cousin worked part-time running the office. Michelle provided limited help with the books but was not paid. The business was Michael and Michelle's only source of income and had been "doing fairly well." Michael's death was "[d]evastating" to the business. Michael's cousin wanted to close the business, but Michelle kept it open after determining that she "stood to lose hundreds of thousands of dollars" if it closed. Michelle hired someone to service the equipment but, because the business no longer had anyone who could handle sales, it lost three major clients and was unable to sign new clients. Michelle paid herself what was left of the business's profits after paying the servicing employee.

The prosecution introduced copies of Michael's W-2 tax forms showing an income of \$23,200 in 2011 and \$18,306 in 2012 (Michael died in October 2012). The prosecution also submitted Michelle's W-2 forms showing an income of \$4,400 in 2012; \$19,800 in 2013; \$8,500 in 2014; \$17,600 in 2015; and \$13,800 in 2016. At a subsequent hearing, the parties stipulated that Michelle's income in 2017 was \$8,100. The prosecution calculated Michelle's economic losses by subtracting her income in each year from 2013 through 2017 from Michael's income of \$23,200 in 2011, the last full year before he died, for a total of \$48,200.

Michelle also testified that she spent "over \$17,000" on funeral and burial expenses. She received \$5,000 from the Restitution Fund for funeral expenses, which a restitution specialist testified was the Restitution Fund limit at that time. In addition, shortly after Michael's death, appellant's daughter mailed Michelle a cashier's check for \$15,000 with a letter indicating the money was to help with funeral expenses. The cashier's check was drawn from appellant's account.

The trial court awarded the requested restitution of \$48,200. Over appellant's objection, the court declined to offset any excess amount Michelle received for funeral expenses. The court reserved jurisdiction over restitution for future years.

DISCUSSION

I. *Jury Trial*

Appellant argues he was entitled to a jury trial on victim restitution, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Southern Union Co. v. U.S.* (2012) 567 U.S. 343 (*Southern Union*). Assuming the claim is not forfeited for failure to object below, we disagree.

“[T]he *Apprendi* court held that, ‘[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’ [Citation.] [¶] Thereafter, in *Southern Union*, the United States Supreme Court held that Sixth Amendment right to a jury applies to ‘sentences of criminal fines.’ ” (*People v. Foalima* (2015) 239 Cal.App.4th 1376, 1398 (*Foalima*).)

California Courts of Appeal have uniformly rejected the argument that these cases require victim restitution to be submitted to a jury: “[N]either *Apprendi* nor *Southern Union* applies to direct victim restitution because direct victim restitution is not a criminal penalty. [Citation.] ‘[D]irect victim restitution is a substitute for a civil remedy so that victims of crime do not need to file separate civil suits. It is not increased “punishment.” ’ [Citation.] Section 1202.4 imposes no statutory limits on the amount of direct restitution a court may order. [¶] . . . Since direct restitution is not a criminal penalty and is not subject to a statutory maximum amount, it is not subject to a jury trial and may be imposed based on the preponderance of the evidence.” (*Foalima, supra*, 239 Cal.App.4th at pp. 1398–1399; accord, e.g., *People v. Wasbotten* (2014) 225 Cal.App.4th 306, 309; *People v. Sweeney* (2014) 228 Cal.App.4th 142, 155.) Federal circuit courts have done the same. (E.g., *U.S. v. Rosbottom* (5th Cir. 2014) 763 F.3d 408, 420 [“ ‘*Apprendi* is inapposite because no statutory maximum applies to restitution.’ ”]; *U.S. v. Wolfe* (7th Cir. 2012) 701 F.3d 1206, 1217 [“restitution is not a criminal penalty”]; *U.S. v. Leahy* (3d Cir. 2006) 438 F.3d 328, 337 [“a restitution order does not punish a defendant beyond the ‘statutory maximum’ as that term has evolved in the Supreme

Court’s Sixth Amendment jurisprudence”].) Appellant cites no case holding otherwise. We follow this uniform authority and reject appellant’s claim.²

II. *Right To Be Present*

Appellant argues his constitutional and statutory right to be present at the restitution hearings was violated. We find any violation harmless beyond a reasonable doubt.

At a June 2017 restitution hearing, when the court and the attorneys were discussing a date for the evidentiary hearing, appellant’s counsel said he would “contact [appellant] again and tell him what is happening. And if he wants to be here, I will come back to the Court asking for a removal order.” The court responded that counsel could “[j]ust come to chambers and get a removal order. Otherwise his appearance is waived at this point.” At the beginning of the October 2017 evidentiary hearing, appellant’s counsel represented that he had “been in communication” with appellant and requested “the opportunity to, given that I don’t have a client here, supplement the record with whatever additional information I get from him.” The court agreed. The restitution hearing continued in March 2018. Appellant’s counsel did not supplement the record.

“A defendant has a right to be present at critical stages of a criminal prosecution, a right protected by both the federal constitution and the state constitution. [Citations.] California has also guaranteed the right by statute: ‘In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present’ (Pen. Code,

² Even if, as appellant argues, one purpose of victim restitution is punitive, our Supreme Court has held “the *primary* purpose of mandatory restitution, as of civil damage recovery, is reimbursement for the economic loss and disruption caused to a crime victim by the defendant’s criminal conduct.” (*People v. Runyan* (2012) 54 Cal.4th 849, 865, *italics added*.) We decline to find *Apprendi* applies in such circumstances.

§ 977, subd. (b)(1); see id., § 1043, subd. (a) [‘the defendant in a felony trial shall be personally present at the trial’].) [¶] The right includes the defendant’s presence at ‘critical stage[s] of the criminal prosecution,’ which includes ‘sentencing and pronouncement of judgment.’ ” (*People v. Wilen* (2008) 165 Cal.App.4th 270, 286–287.)

The parties agree appellant had the constitutional and statutory right to be present at the restitution hearings, but dispute whether appellant validly waived the right. We need not decide whether there was a valid waiver because we find any error harmless under any standard. (*People v. Davis* (2005) 36 Cal.4th 510, 532–533 [“Under the federal Constitution, error pertaining to a defendant’s presence is evaluated under the harmless beyond a reasonable doubt standard Error under sections 977 and 1043 is state law error only, and therefore is reversible only if ‘ “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” ’ ”].) In *Davis*, the California Supreme Court found the defendant’s absence at a pretrial hearing on the admissibility of jailhouse recordings harmless beyond a reasonable doubt where the defendant’s attorneys “had ample opportunity to discuss the contents [of the recordings] with defendant and to seek his assistance in deciphering the recorded conversation [and] have consulted with him after the hearing, and could have brought to the court’s attention at a later time any possible contributions or corrections that defendant might have made.” (*Id.* at p. 533.) Similarly, appellant had the opportunity to discuss the restitution motion with his attorney before the evidentiary hearing. In fact, before the evidentiary hearing, appellant provided his attorney with the cancelled check of the \$15,000 payment to Michelle, information that his attorney relayed to the prosecutor and the court. At the evidentiary hearing, appellant’s counsel expressly reserved the right to supplement the record with any information he received from appellant and the trial court agreed any such supplementation would be allowed. Thus, appellant, like the defendant in *Davis*, had ample opportunity to provide his

counsel with any information relevant to the restitution hearing.³ Accordingly, appellant's absence from the restitution hearings was harmless under both the federal and state law standards. (See *id.* at p. 534.)

III. *Calculation of Award*

Appellant makes two challenges to the trial court's calculation of the restitution award. First, he argues the court erred in failing to offset excess payments Michelle received for funeral expenses. Second, he argues the court erred in its calculation of Michelle's economic loss from Michael's business income.⁴ As we explain below, we agree with the first claim, but reject the second.

A. *Offset For Restitution Previously Received*

Michelle testified that she spent over \$17,000 on Michael's funeral, and received \$15,000 from appellant and \$5,000 from the Restitution Fund. Therefore, according to her testimony, she received approximately \$3,000 more than she spent. The trial court nonetheless refused to offset this excess amount from the restitution award: "she spent maybe 17[,000]. And she may have gotten 5[,000] plus 15[,000]. So if she got more money than she was entitled to, oh, well. That does not have anything to do with her wage loss nor will it be offset in any way for her wage loss." We agree with appellant that the trial court erred in refusing to offset.

As an initial matter, the People contend the challenge is not cognizable because the trial court did not order restitution for the funeral expenses. The trial court did order appellant to pay victim restitution, an order that appellant claims should be reduced by the excess amount paid by appellant and the Restitution Fund for funeral expenses. The challenge is cognizable.

³ Appellant speculates that, because he and Michael were friends, they must have discussed Michael's "business and its economic viability, especially in light of the ongoing 2008 economic crisis." Appellant had the opportunity to provide any such relevant information to his attorney, both before and after the evidentiary hearing.

⁴ Appellant frames these challenges in multiple ways: a failure to make required findings sufficient for meaningful appellate review, an excess of jurisdiction, and an abuse of discretion.

“[T]he amount of restitution ordered is intended ‘to make [the] victim whole, not to give a windfall.’ ” (*People v. Fortune* (2005) 129 Cal.App.4th 790, 794–795.) As the People note, a defendant is not entitled to an offset for reimbursement to the victim from third parties, such as the victim’s private insurance. (See *People v. Birkett* (1999) 21 Cal.4th 226, 246 [a defendant must “make full restitution for all ‘losses’ his crime had caused, and that such reparation should go entirely to the individual or entity the offender had directly wronged, regardless of that victim’s reimbursement from other sources” (italics omitted)]..)

However, this principle does not apply to any reimbursement made to the victim by the Restitution Fund. For such payments, the defendant pays restitution to the Restitution Fund to cover this reimbursement, but does not also pay the victim this amount. (§ 1202.4, subd. (f)(2) [“Restitution ordered pursuant to this subdivision shall be ordered to be deposited in the Restitution Fund to the extent that the victim, as defined in subdivision (k), has received assistance from the California Victim Compensation Board”].)

In addition, the principle that defendants get no offset for reimbursement to the victim from third parties does not apply to reimbursement made by *the defendant’s* insurer. (*People v. Bernal* (2002) 101 Cal.App.4th 155, 166–167.) *Bernal* reasoned that reimbursements from sources “completely distinct and independent from the defendants were simply fortuitous events from which the defendants should not benefit [and are generally] subject to claims for reimbursement”; accordingly, “equitable principles would tend to place the loss on the wrongdoing defendant, preclude a windfall recovery by the victim, and reimburse the third party.” (*Ibid.*) In contrast, when the defendant’s “insurance company made payments to the victim on his behalf pursuant to its contractual obligation to do so, the carrier would have no recourse against [the defendant],” and if the defendant received “no credit for the defendant’s insurance payment, the victim would receive a windfall to the extent that such payments duplicated items already reimbursed by [the defendant’s] carrier.” (*Id.* at p. 167.) The same

reasoning requires defendants to receive credit for reimbursements they themselves previously made, such as appellant's \$15,000 payment to Michelle.⁵

The People contend appellant cites no authority that excess payments for one type of loss can be offset against payments for another type of loss. Appellant cites authority that restitution is not intended to confer a windfall on the victim, and we see nothing in the statute precluding such an offset.

As appellant notes, the trial court did not make findings as to the actual or reasonable funeral expenses, findings of fact on which we express no opinion. We will remand for the court to make such findings, and then to offset any excess amount received by Michelle from the overall award ordered.⁶

B. *Loss of Support*

Appellant raises a multitude of challenges to the trial court's calculation of the lost business income. We reject them all.

1. *Loss of Income/Loss of Support*

The trial court calculated restitution by multiplying Michael's 2011 income by five years, and then subtracting Michelle's income from the five years since Michael's death. The calculation was designed to leave Michelle with a total income equal to what Michael would have made if appellant had not murdered him.

As appellant argues, "a surviving spouse's economic loss is not simply the wages or income that the deceased spouse would have earned but for his or her death. . . . Instead, a surviving spouse may receive restitution only in the amount of his or her own economic loss." (*People v. Giordano* (2007) 42 Cal.4th 644, 664 (*Giordano*)). Thus,

⁵ Although the People assert the \$15,000 payment was from appellant's daughter, the record is clear that the money came from appellant's account.

⁶ Before receiving this offset, which is based in part on appellant's obligation to repay the Restitution Fund for its \$5,000 payment to Michelle, appellant must fulfill this obligation. We note that, although appellant did not oppose the People's request for this repayment (or for the repayment of the Restitution Fund's \$5,000 payment to another victim), the record on appeal is unclear as to whether the trial court so ordered. Any necessary clarification shall be made on remand.

“the surviving spouse’s economic loss is best described as a loss of economic *support*.” (*Id.* at p. 665.) “Generally, the calculation of the loss of support may be informed by such factors as the earning history of the deceased spouse, the age of the survivor and decedent, and the degree to which the decedent’s income provided support to the survivor’s household.” (*Ibid.*) As in *Giordano*, the trial court’s calculation here “assumes that [the decedent’s wife] was entitled to receive her husband’s gross annual earnings, not just that portion of his earnings that went to her economic support.” (*Ibid.*)

The trial court’s erroneous assumption does not automatically require reversal, however. Instead, we consider whether appellant has “shown that [Michelle’s] loss of support was less than the amount of restitution ordered.” (*Giordano, supra*, 42 Cal.4th at p. 666.) In *Giordano*, the trial court calculated restitution “by multiplying decedent’s average annual earnings over the three years prior to his death by five years.” (*Id.* at p. 663.) This calculation “assume[d] that five years is the appropriate term for loss of support restitution,” even though the decedent “was relatively young when he was killed” (*Id.* at pp. 665–666.) The Supreme Court noted that the trial court “could have calculated loss of support using a longer period of time.” (*Id.* at p. 666.) Accordingly, the Supreme Court affirmed the award because the “defendant has not shown that a method designed to approximate [the wife’s] loss of economic support, taking into consideration the deceased victim’s anticipated years of contribution to his wife’s support, would have resulted in an amount of restitution less than” five years of the decedent’s lost income. (*Id.* at p. 666.)

In the instant case, the trial court’s calculation assumes that Michelle is only entitled to the difference between Michael’s income from the business and the income Michelle has made from the business since his death. However, the trial court could have calculated Michelle’s loss of support without reducing it by her income. Michelle’s loss can be characterized as “ ‘the loss of financial benefits [Michael] was contributing to his family by way of support at the time of his death and that support reasonably expected in the future.’ ” (*Giordano, supra*, 42 Cal.4th at p. 665.) This loss is not altered by Michelle’s decision to work and therefore earn an income after Michael died. If Michael

had been an employee of a different employer before his death, Michelle's economic loss would be the full loss of support contributed by Michael's income, not this amount minus any income she earned from working after his death. We see no basis to apply a different principle where the decedent owned his own business and his wife took it over after his death.

Accordingly, guided by *Giordano*, we conclude appellant has not shown that a method of calculation designed to approximate Michelle's loss of economic support, taking into consideration the full amount of Michael's anticipated contribution to Michelle's support without deductions for her earned income, would have resulted in an amount of restitution less than that ordered by the court. (See *Giordano, supra*, 42 Cal.4th at p. 666.)

2. Additional Challenges

We reject appellant's multiple additional challenges to the loss of support order.

The record is sufficient to enable meaningful appellate review. The trial court's method of calculation is clear.

Appellant argues the evidence presented was incomplete in a number of ways. However, the evidence was sufficient to make a prima facie showing of Michelle's economic loss. "Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant's criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim." (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543.) Accordingly, it was appellant's burden to present the evidence he contends would have shown a different amount of loss. Appellant also argues the trial court failed to consider various factors. "[A] trial court has broad discretion to choose a method for calculating the amount of restitution" (*Giordano, supra*, 42 Cal.4th at p. 663.) "No abuse of that discretion occurs as long as the determination of economic loss is reasonable, producing a nonarbitrary result." (*Id.* at p. 665.) The trial court was not required to consider every factor that might conceivably impact the loss of support.

In any event, we are not persuaded the concerns raised by appellant would have resulted in a more favorable outcome. Appellant complains that Michael's average

income was based on his income from only one year, 2011. But Michael's 2012 income, until his death in October of that year, was proportionately consistent with his 2011 income, suggesting 2011 was a representative year. Appellant argues the trial court should have considered the depressed state of the economy resulting from the 2008 recession when determining whether Michael's 2011 income was representative. Even assuming the economy in the relevant industry was depressed in 2011 (an assumption for which there is no record evidence), the only effect would be that Michael's 2011 income was *lower* than usual, a factor that benefits appellant. Appellant suggests the business was at or near insolvency when Michael died, apparently based on what appellant considers to be a low income earned by Michael. The evidence nonetheless demonstrates the business was running a profit. Appellant contends the trial court failed to consider Michelle's decisions about keeping the business instead of selling it, not attempting to grow it, and how much income to draw from the business. We have concluded above that Michelle would be entitled to the entire amount of support lost, regardless of whether she chose to recoup some of that lost support through her own work. We thus see no relevance to her decisions regarding the business.

Finally, appellant argues the order was arbitrary and capricious, in violation of his right to due process, because the restitution calculation depended on Michelle's business income, which she controlled. As we have explained above, the trial court could have calculated restitution without reducing the loss of support by Michelle's income. Accordingly, no due process violation occurred.

IV. *Continuing Jurisdiction*

Section 1202.46 provides, "when the economic losses of a victim cannot be ascertained at the time of sentencing pursuant to subdivision (f) of Section 1202.4, the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution until such time as the losses may be determined." The People requested annual restitution hearings to determine loss of support "up until the time that [Michael] would have been approximately 67 years old." The court reserved jurisdiction on future restitution.

Appellant argues the trial court did not find that future losses could not be ascertained at the time of sentencing, and therefore the trial court was required to make a finding about future loss of support. The trial court apparently found it was too speculative to estimate Michelle's future earnings. As appellant contends, the trial court could have determined an estimated loss for future years based on Michelle's average income from the past five years. However, the trial court was not required to use this method if it deemed the approach too speculative.⁷

Appellant also argues the trial court's reservation of jurisdiction did not identify when jurisdiction would end. Appellant cites no authority that the trial court must so specify at the time it reserves future jurisdiction. Appellant questions whether jurisdiction will continue after Michael's likely retirement age, when Michael would have retired, and whether Michael would have died of natural causes before retirement. These issues are not before us.

DISPOSITION

The restitution order is reversed and remanded for further proceedings to determine actual and reasonable funeral expenses, to offset any excess amount received for funeral expenses against the loss of support restitution award, and for any other proceedings not inconsistent with this opinion.

⁷ We have concluded above that the trial court did not need to consider Michelle's income in determining the amount of loss of support. If additional restitution is awarded based on an approach that does not rely on her income, it may no longer be appropriate to reserve jurisdiction.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A153883)